

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

JOMATT CORP.

CASE NO. 03-66935

Debtor

Chapter 11

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

Under consideration by the Court is a motion filed on February 13, 2004, by LLP Mortgage Ltd. ("LLP") seeking relief from the automatic stay pursuant to § 362(d)(1) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Opposition to the motion was filed on February 26, 2004 by Jomatt Corporation (the "Debtor").

The motion was heard by the Court at its regular motion term in Syracuse, New York, on

March 2, 2004. It was adjourned on the consent of both parties to determine what position the County of Oswego (the “County”) was taking with regard to the ownership of two parcels of real property located in Constantia, New York (the “Premises”), which are the subject of LLP’s motion. In the interim, opposition to the motion was also filed on behalf of BSB Bank & Trust Company (“BSB”) on March 31, 2004.<sup>1</sup> Following oral argument on April 6, 2004, the matter was submitted for decision.

### **JURISDICTIONAL STATEMENT**

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1) and (b)(2)(A), (G) and (O).

### **FACTS**

The Debtor owns and operates a marina and campground in Constantia, New York. It is alleged that the Debtor failed to pay real property taxes totaling approximately \$79,169 for the year 2001. As a result, the County filed a Notice of Petition of Foreclosure (“Foreclosure Notice”) in New York State Supreme Court, County of Oswego (“State Court”), for the unpaid taxes on or about October 4, 2002. Exhibit B of LLP’s Motion. According to the Foreclosure

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<sup>1</sup> BSB contended that LLP never recorded its assignments of mortgages from the Small Business Administration (“SBA”), which was the original mortgage holder on the Premises. While not relevant to the matter presently before the Court, LLP indicates that the assignments were duly recorded in the County Clerk’s office on August 13, 2001. *See* LLP’s Response to Objection by BSB Bank & Trust, filed April 2, 2004.

Notice, “the last day for redemption of any parcel in this proceeding [which included the Premises] is hereby fixed as the 17th day of January 2003. *Id.* The Foreclosure Notice further states that

FAILURE TO REDEEM OR ANSWER: PLEASE TAKE FURTHER NOTICE that, in the event of a failure to redeem or answer by any person having the right to redeem or answer, said person or persons shall be forever barred and foreclosed of all of his or her right, title, interest, and equity of redemption in and to the parcel described in said Petition and a judgment of foreclosure may be taken by default.

*Id.*

On March 6, 2003, the Deputy County Attorney, Richard C. Mitchell (“Mitchell”), submitted an Affidavit of Regularity in support of an application for the entry of a final judgment taken by default by the County pursuant to New York Real Property Tax Law (“NYRPTL”) § 1136(3). Exhibit C of LLP’s Motion. On March 7, 2003, the Honorable John J. Elliott, Acting Justice of the State Court, signed a Final Judgment awarding possession of the Premises to the County. Exhibit D of LLP’s Motion. The Final Judgment was entered in the County Clerk’s office on March 13, 2003, and a deed was recorded that same day transferring the Premises to the County. Exhibit E of LLP’s Motion.

On April 10, 2003, the County Legislature issued a “Resolution Adopting Tax Delinquent Property Auction Policy for 2003” (the “Resolution”). Exhibit F of LLP’s Motion. Under its terms, “[p]rior owners, their immediate family and/or agents may not bid at auction but may redeem their properties until 5 P.M. on Thursday, October 16, 2003.” *Id.* The actual auction was to be conducted on October 18, 2003, in Mexico, New York. *Id.*

The Debtor filed a voluntary petition (“Petition”) pursuant to chapter 11 of the Code on October 15, 2003, without redeeming or repurchasing the Premises. In its Schedules, filed on

October 30, 2003, the Debtor identifies the Premises as having a market value of \$620,000. *See* Schedule A. Debtor lists LLP as holding a first mortgage on the Premises in the amount of \$537,000. *See* Schedule D. The Debtor also lists BSB as holding a second mortgage on the Premises. *Id.* LLP and BSB are the only secured creditors listed in the Debtor's Schedules. The Debtor lists the County as having an unsecured priority claim in the amount of \$79,169 for real property taxes for 2001. The New York State Department of Taxation is also listed as a priority creditor with a claim of \$8,854 owed for corporate taxes for the years 1995-2001. The Debtor lists no unsecured creditors.

## ARGUMENTS

LLP seeks relief from the automatic stay to allow it to purchase the Premises from the County. While it is LLP's position that the Debtor no longer has any interest in the Premises, it elected to file its motion in an abundance of caution. The Debtor takes the position that by filing its Petition prior to the end of the "redemption period" provided for in the Resolution, it still is entitled to redeem the Premises. However, based on conversations with Mitchell, LLP's counsel argues that the Resolution was not intended to reinstate the Debtor's right of redemption, which expired on January 17, 2003. *See* Letter, dated March 31, 2004, from Mitchell, attached as Exhibit A to the Supplemental Affirmation of R. John Clark, Esq., counsel for LLP, dated April 1, 2004. According to LLP, the Resolution was intended merely to provide the Debtor with an option to repurchase the Premises.<sup>2</sup>

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<sup>2</sup> In Mitchell's letter of March 31, 2004, he indicates that the Debtor's repurchase of the Premises was subject to approval of the County Legislature. However, the Resolution makes no

It is the Debtor's position that the redemption period is not governed by Code § 108(b), which arguably would have required the Debtor to exercise the option within 60 days of the petition date under the facts herein. Instead, the Debtor contends that Code § 1124 allows a debtor to alter the redemption period "which would otherwise run pursuant to nonbankruptcy law and the 60-day time limit of Section 108(b)." Debtor's Supplemental Memorandum of Law, dated April 2, 2004, at 4.

## DISCUSSION

The question presented to the Court concerns what interest the Debtor had in the Premises at the time it filed its Petition. Neither party disputes the fact that the Debtor's statutory right to redemption expired on January 17, 2003. Nor is there any dispute that title to the Premises was transferred by deed to the County on March 13, 2003. Once transferred, properties, such as the Premises,

must be considered county properties and the county owns them proprietorially and can continue to hold it, sell it or lease it . . . or otherwise dispose of them at such time and upon such terms as shall be determined by the County Legislature, with or without advertising for bids, subject only to ultimate approval by a majority vote of that body . . . and [it has been held] the wisdom of such sales is for the governing body to determine and not the courts.

*Cooke v. Mulligan*, 81 Misc.2d 1025, 1027 (N.Y. Sup. Ct. 1975).

Thus, the County had legal title to the Premises and was within its authority to dispose

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such express provision, other than to state that "[a]ll properties to be sold at public auction will have prior approval by the Oswego County Legislature." Resolution at ¶ 2, attached as Exhibit F to LLP's Motion.

of the properties on its own terms, as set forth in the Resolution. In this case, the Debtor would have the Court conclude that the language in the Resolution provided the Debtor with sufficient interest in the Premises to warrant a finding that the interest became property of the estate at the time the Debtor filed its Petition. Assuming, without making a definitive finding, that this was true for purposes of this discussion, in order to succeed with its opposition to LLP's motion, the Debtor must also establish that Code § 362 indefinitely tolls the "redemption period" referenced in the Resolution, allowing it to provide for payment in full to both the County and LLP through its plan.

In this regard, the Debtor relies on a decision of the U.S. District Court for the District of Vermont, namely *In re Taylor*, 286 B.R. 275 (D. Vt. 2002). In that case, the debtor proposed to cure the defaults under a mortgage on her residence through her chapter 13 plan. Under Vermont law, the debtor retained the right of redemption until the date specified in the judgment of foreclosure. *Id.* at 280. Under the terms of the judgment of foreclosure in *Taylor*, that date was set as May 22, 2002, five days after the debtor filed her petition on May 17, 2002. *Id.* at 277-78. The issue before the court in *Taylor* involved "when the Section 1322(c)(1) right to cure expires in a strict foreclosure regime." *Id.* at 280. The court concluded that "the operative date of the 'foreclosure sale' specified in Section 1322(c)(1) is the date on which all of the debtor's rights in the subject property are extinguished, including rights of redemption." *Id.* at 282. The court concluded that the debtor was entitled to cure the defaults because the debtor had filed her petition within the period for redemption and still retained an interest in the property. *Id.* at 282.

An important distinction must be made with respect to the *Taylor* case. It was "governed by Section 1322(c)(1), which contains provisions uniquely tailored to protect homeowners' primary residences" in chapter 13 cases. *Id.* at 279. The Debtor in the case now before this Court

is a corporation in chapter 11 to which Code § 1322(c)(1) has no application. Code § 1123, which addresses the contents of a chapter 11 plan, has no comparable provision providing for a pre-foreclosure sale right to cure a default on a real property mortgage, particularly where the property is not the primary residence of the debtor.

For purposes of this discussion, the more appropriate focus of the Court must be on the interplay between Code § 362(a) and Code § 108(b). While the Debtor would have the Court conclude that Code § 362(a) creates an indefinite stay of the “redemption period” provided for in the Resolution, this Court is persuaded that Code § 362(a) is superceded here by the timing provisions of Code § 108(b). *See Merchants Bank v. Frazer (In re Frazer)*, 253 B.R. 513 (D.Vt. 2000) (hereinafter “*Frazer I*”), *aff’d sub nom. Canney v. Merchants Bank*, 284 F.3d 362 (2d Cir. 2002) (hereinafter “*Frazer II*”).

In that case, Merchants Bank held a mortgage on the debtor’s non-residential real property on which was located a restaurant and store. The U.S. Court of Appeals for the Second Circuit concluded that “the period of equitable redemption was not stayed when Frazer filed a Chapter 13 bankruptcy petition . . . although it is extended by section 108(b) by 60 days after filing of the petition.” *Frazer II* at 373.

As noted by the District Court in *Frazer I*,

while § 362(a) broadly protects debtors in general terms, § 108(b) is narrow in its scope. It applies specifically to those debtors who, prior to filing for bankruptcy, entered into agreements which created a limited time period within which they must make some affirmative act, but filed for bankruptcy prior to the expiration of that period. Therefore, while all debtors are generally protected under the indefinite stay of § 362(a), that protection is limited for those who had pre-existing agreements to pay by a particular date under § 108(b).

*Frazer I*, 253 B.R. at 518-19; *see also In re Young*, 48 B.R. 678, 683 (Bankr. E.D. Mich. 1985) (indicating that “§ 362(a) effectuates no tolling of the redemption period . . . . Extension of the redemption can be no greater than that permitted by § 108(b), absent exceptional circumstances [such as fraud, mistake, accident or erroneous conduct].”).

In *Young*, the debtor filed a chapter 11 petition two days prior to his one year statutory right of redemption under Michigan law following a sheriff’s sale foreclosing on the mortgages on his farm property. The debtor filed his petition intending to file a plan which provided either for redemption of the property or the cure of the default on the mortgage and a deceleration of the mortgages under Code § 1124. *Id.* at 679.

The court in *Young* concluded that the right of redemption had a finite lifetime which could be extended pursuant to Code § 108(b) only 60 days postpetition. Furthermore, the court held that the purchaser at a foreclosure sale has “equitable title which will ripen into full legal title unless the redemption price is paid . . . .” The court concluded that the purchaser was not the holder of a claim against a debtor once a foreclosure sale of the debtor’s property had occurred, because the purchaser, even if it is a mortgagee, had no right to payment from the debtor as the mortgage ceased to exist once the sale had occurred. Accordingly, it found that “there is no claim or interest in the property which is subject to deacceleration under § 1124(2).” *Id.* at 683. The court noted that any theoretical right that may have been held by the debtor existed only so long as the debtor had an interest in the property. *Id.* Any such right ceased to exist 60 days after the debtor filed his petition pursuant to Code § 108(b).

In the case *sub judice*, there was never a contract between the Debtor and the County. All that existed was the statutory obligation that the Debtor pay real property taxes. As a result of the Debtor’s delinquency and its failure to exercise its statutory right of redemption, possession

of the Premises was awarded to the County on March 7, 2003, as evidenced by the recording of a deed in the County Clerk's office on March 13, 2003.

The Resolution created a limited time period in which the Debtor could "redeem" the Premises. Under the terms of the Resolution, the County extended an offer to the Debtor and his family to repurchase the Premises prior to 5:00 p.m. on October 16, 2003, which the Debtor failed to accept. Although the Debtor certainly never expressly agreed to the terms of the Resolution, it appears before this Court now wanting to adopt those terms, provided it is able to stay the time period and "redeem" or repurchase the Premises pursuant to a plan of reorganization. Based on the analysis in *Frazer I* and *II*, as well as that in *Young*, the Court concludes that Code § 362(a), as applied to the facts presently before this Court, is limited by reference to Code § 108(b). Accordingly, the Court must conclude that pursuant to Code § 108(b) the Debtor had only until December 15, 2003, to "redeem" or repurchase the Premises. No action was taken by the Debtor during the 60 days postpetition. Accordingly, any right the Debtor may have had to repurchase the Premises on the date of filing no longer exists. Therefore, LLP is entitled to proceed with its purchase of the Premises from the County.

Based on the foregoing, it is hereby

ORDERED that LLP's motion pursuant to Code § 362(d)(1) is granted.

Dated at Utica, New York

this 7th day of May 2004

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge

